United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74 -1604

Bp/s

UNITED STATES COURT OF APPEALS

For the Second Circuit

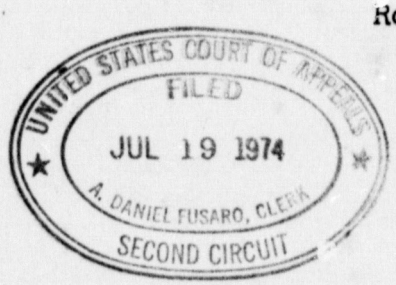
Docket No. 74-1604

OGDEN DEVELOPMENT CORPORATION and
THE DWIGHT BUILDING COMPANY,
Plaintiffs-Appellants,

-against-

FEDERAL INSURANCE COMPANY,
Defendant-Appellee.

Brief on Behalf of
Plaintiffs-Appellants



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BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

This is an appeal from an order and judgment of the District Court for the Southern District of New York (Tenney, J.) granting defendant's cross-motion for summary judgment dismissing the complaint and denying plaintiffs' motion for interlocutory judgment on the issue of liability or, in the alternative, for an order pursuant to Rule 56(d) stating what facts appear without substantial controversy and directing what further

proceedings are required.

References to the appendix will be by pages of the appendix. All exhibits but three have been reproduced in the appendix. Exhibits 8, 9 and 10 annexed to plaintiffs' motion papers were too voluminous to be reproduced although Exhibits 8 and 9 are keystones on this appeal. The three exhibits are in the record on appeal and will be referred to by page of the exhibit and by exhibit number, - thus: "p. 4C-3-2 of Exhibit 9".

The Issues and How They Arise

The University of Vermont (the "University") invited proposals for the design and construction of a living/learning center in accordance with the University's specifications. To receive a copy of the specifications a prospective participant was required to post a $20,000 bond conditioned on his submission of a complete proposal. Each prospective participant was notified in writing at the time he received the specifications that, if after seeing the specifications he wished to withdraw, the University would return his bond; that, if he elected to continue but failed to submit a

complete proposal, the proceeds from his bond would be used to reimburse the University for any loss it might sustain by his failure and the balance would be paid to those participants who had submitted complete proposals but had not been awarded the contract. Each participant who elected to continue was given the names of all others who had elected to continue.

Three participants elected to continue, - namely The Carlson Corporation, Ogden/Dwight (which was plaintiffs' joint venture) and Charles Pankow, Inc. (which is the principal on the bond involved in this action against the surety). Carlson and plaintiffs submitted complete proposals. Pankow did not. The University awarded the contract to Carlson and demanded that Pankow respond on its bond. On Pankow's failure to respond, the University assigned to plaintiffs its claim on Pankow's bond. This action is against the surety for the lesser of $20,000 and plaintiffs' expenses in preparing their complete proposal.

The lower court has said that plaintiffs are but incidental beneficiaries of a contract between the University and Pankow and are therefore not entitled to recover (15a-17a).

There were several minor issues raised by the answer (33a-37a) which the lower court noted but did not decide (11a). They will be discussed as a group under Point 3.

The Facts

The lower court has recited the facts rather fully in its opinion (5a-10a).

In September 1969 the University began to experiment with an educational concept under which a fraction of the student body lived and studied apart from the main body (51a; p. 2B-1 of Exhibit 8). The results seemed to indicate that the students who participated in the program acquired a better education (51a-52a). A year later the University resolved to expand the program by housing a larger fraction of the student body in a complex known as a living/learning center which would be designed and built especially for the program (52a). Most of the education and living requirements of the student would be met at the center. He would be housed and fed there (52a). He would receive the larger part of his instruction there from resident members of the faculty (52a). He would have his own recreational and social facilities there (52a).

The University proposed to issue revenue bonds to finance the construction of the living/learning center (52a). It contemplated that the fees paid by the students at the center would meet the operating expenses, the amortization of the bonds and part of the annual interest cost (52a). The United States Department of Housing and Urban Development ("HUD") and the United States Office of Education ("OE") agreed to make annual grants in amounts sufficient to meet that part of the bond interest which would exceed three percent per annum (52a-53a).

In mid-1970 the University publicized its intention of inaugurating a contest for the design and construction of the living/learning center in accordance with specifications to be issued by the University and at a price to be prescribed by the University (53a). There was a meeting in Burlington, Vermont on September 25, 1970 at which the concept was discussed with some forty persons who had expressed an interest (53a). After the meeting the Educational Facilities Laboratory in New York City awarded the University $12,000 to develop the concept, whereupon the University retained a Montreal architect to assist in preparing a document

called the "Request for Proposals" (the "Request") which would specify what a design/build proposal must contain and what it must cost (53a).

After the Request had been prepared, the University issued to any group evidencing an interest in submitting a design/build proposal a brochure entitled "Pre-Qualification Documents" giving a short explanation of the purpose of the contest and stating what information and papers a would-be participant must file before he could enter the contest and receive a copy of the Request (54a). One requirement was the filing of a bond or certified check for $20,000 conditioned on the submission of a complete proposal (54a; p. 1A-1 of Exhibit 8). In the front of "Pre-Qualification Documents" (Exhibit 8) was a letter by a vice president of the University which said (page 1):

> "The University proposes to select a single proposal according to quality and design; the cost, therefore, will be fixed and in the neighborhood of $5,750,000."

The letter concluded with the statement:

> "Requests for Design/Build Proposals will be released, on 21 June 1971

> ONLY to those prospective DESIGN/ BUILD TEAMS who have completed these documents, and who have demonstrated, in their response, that they can satisfactorily complete the project."

After mentioning the proposal performance bond or certified check for $20,000 which a prospective participant must file before he would receive a copy of the Request (p. 1A-1 of Exhibit 8), the brochure said (54a; p. 1A-1):

> "If a DESIGN/BUILD TEAM finds that they cannot prepare an adequate proposal, they should notify the University in writing before 30 June 1971, in which case the proposal bond or check will be returned."

Charles Pankow, Inc. ("Pankow"), a contracting company in Altadena, California, requested and received a copy of Exhibit 8, the folder entitled "Pre-Qualification Documents" (55a). On or about June 21, 1971 the University received Pankow's bond (55a). The bond is a joint and several obligation for $20,000 in which Pankow is described as the principal and defendant, Federal Insurance Company, as the surety (29a-30a). It is conditioned upon the submission of a complete proposal (idem).

Nine prospective participants, or groups, qualified to receive copies of the Request (55a). Eight posted bonds for $20,000 and one a bank cashier's check for $20,000 (55a). As the security was received and the other pre-qualification documents were found to be in order, the University sent the Request (Exhibit 9) to the group so filing (55a). Pankow's copy of the Request was sent to it on June 21, 1971 (55a).

The Request (Exhibit 9) was a voluminous document prescribing what a design/build proposal must contain (55a). It again said that, if any design/build team after reading the Request decided that it could not prepare an adequate proposal, it should notify the University, whereupon its bond or check for $20,000 would be returned (55a-56a; p. 2A-2 of Exhibit 9). The Request also said that any team which intended to continue should so notify the University by registered letter before July 2, 1971 (idem).

The Request explained that the bond or check of any group which elected to continue would be returned if the University received from the group by September 6, 1971 a complete design/build proposal; otherwise the

$20,000 would be forfeited (56a; p. 2A-2 of Exhibit 9). The Request explained, however, that (56a; p. 2A-2 of Exhibit 9):

> "It is not the intention of the University to profit from such forfeiture; the money will be used to cover any expenses incurred by the University because of the failure of any DESIGN/BUILD TEAM to submit a complete DESIGN/BUILD PROPOSAL and the remainder distributed among those DESIGN/BUILD TEAMS who have submitted unsuccessful proposals."

The University had adopted the bond device so that the design/build teams would know that the University intended to carry out in good faith its part of the bargain (56a). It was not going to award the contract to a team which submitted a proposal that failed to comply with the Request (56a). It was obvious that the University could suffer only slight damage if a participant submitted an incomplete proposal (57a). It therefore held out to those who participated in good faith not only the assurance that the University would not award the contract to a design/build team which failed to comply but also the assurance that, if anyone

in the contest failed to comply, those who had complied but had not been awarded the contract would receive some reimbursement of the expenses which they had incurred in complying (57a).

Pursuant to the opportunity to withdraw after seeing the Request, six of the nine who had qualified elected to withdraw and they received back the security which they had posted (57a). Three groups elected to continue, namely, Pankow, The Carlson Corporation and a joint venture of plaintiffs ("Ogden/Dwight") (57a-58a). Under date of July 2, 1971 Pankow wrote the University that it had received its copy of the Request and that it elected to stay in the contest (58a, 65a). Under date of July 7, 1971 the University wrote Pankow acknowledging receipt of its letter and notifying it that Carlson and Ogden/Dwight were the other contestants which were continuing (58a, 66a).

The brochure entitled "Pre-Qualification Documents" had said that design/build proposals would be due on August 23, 1971 but that the University reserved the right to extend the time (last page of Exhibit 8). The Request prescribed September 6 as the date by which all design/build proposals must be submitted but again said

that the University reserved the right to extend the time (58a; p. 7A-1 of Exhibit 9). September 6 was Labor Day, so the three contestants were notified that September 7 would be all right (58a). Thereafter, by telegram dated August 17, each participant was notified that the time had been extended to September 13 (58a).

All three contestants submitted their proposals by September 13 (58a). The Ogden/Dwight and Carlson proposals complied with the Request and were therefore submitted for evaluation by the University's evaluating committee consisting of nine members (58a). Pankow's proposal (drawings, a model and a written report) was submitted at Burlington on September 13 by a messenger who had come from California (59a) and who simultaneously delivered a letter from Pankow entitled "Letter of Clarification" (59a, 68a-70a).

Among other things the letter said that, notwithstanding anything to the contrary in the Request or in Pankow's proposal, Pankow reserved the right not only to revise the mechanical and electrical systems but also the structural systems and related architectural elements in the final working drawings (59a, 68a). The Request had prescribed that the drawings submitted must show the structural, mechanical and electrical systems (59a; pp. 3A-1 and 2 of Exhibit 9).

Pankow's letter went on to say that Pankow intended to reduce the site work by changing the grading from that shown on the site plan and the model which it was delivering (60a, 68a-69a). The Request had required the submission of a site plan showing the location of the buildings in relation to the site lines, in relation to adjacent existing buildings and in relation to existing and new contour lines (60a; p. 3A-1 of Exhibit 9).

Then Pankow's "Letter of Clarification" said that its price would be $6,122,000 (60a, 69a). The Request had plainly prescribed a fixed price of $5,730,000 (60a; pp. 1B-2 and 4B-1 of Exhibit 9). Aware of the price limitation, Pankow wrote that, to meet the University's fixed price of $5,730,000, it would be necessary to make modifications in the proposal which it was submitting (60a, 69a).

Pankow's proposal was so uninformative as to what it would do for $5,730,000 that, after meeting with the attorney for the University and with Philip Bobrow, who was one of the professional architects on the evaluation committee, the University's Chief Financial Officer gave Pankow's messenger at Burlington Airport a letter addressed to Pankow asking it either to withdraw the "Letter of Clarification" or to specify what portions of

its proposal would be modified or removed to comply with the fixed price of $5,730,000 (61a, 71a-72a). The letter said that until the University had had a satisfactory response it must consider Pankow's proposal incomplete and ineligible for presentation to the evaluation committee (idem). The next day the University sent Pankow a copy of the letter by certified mail (61a).

Pankow responded by a three-page telegram dated September 14 which reiterated what had been said in the letter of clarification about the mechanical, electrical and structural systems and the changes in grading (61a, 73a-75a). The telegram then said that, in order to meet the University's price of $5,730,000 (62a, 74a-75a):

> "We further propose to eliminate the living center adjacent to the village center and replace this area by the addition of one floor to each of three of the remaining four living centers."

The foregoing entailed a drastic change from what had been submitted (62a). There was no model. There were no drawings. There was no layout of the new top floors. There were no applicable electrical, mechanical or structural drawings (62a).

But the modification would have violated the Request even if those details had been supplied. The

Request specified that there must be living quarters for approximately six hundred undergraduates, ten resident faculty members and eight resident graduate students (62a; p. 1B-1 of Exhibit 9), that the number of students and faculty members in each housing cluster should not exceed one hundred twenty-three (62a; p. 4C-3-2 of Exhibit 9), and that "there should therefore be at least 5 Housing Clusters" (62a; p. 4C-3-2 of Exhibit 9). To reduce the price to $5,730,000 Pankow proposed to reduce the number of housing clusters to four, which meant either that there be an average of one hundred fifty students to the cluster or that there be only four hundred eighty students housed at the center (62a).

Upon receipt of the Pankow telegram of September 14 (73a-75a), the University's Chief Financial Officer met with the chairman of the evaluation committee, with the attorney for the University and with the three professional architects who were on the evaluation committee (63a). The architects felt that the Pankow proposal as amended could not be evaluated and, moreover, that it did not comply with the specifications in the Request (63a). The University thereupon responded with a telegram offering Pankow until 8 P.M. September 15 to withdraw the "Letter of Clarification" and the telegram

of September 14 (63a, 76a-77a). The University informed Pankow that, if this was not done, its $20,000 would be forfeited (idem).

In the night of September 16 the University received a cryptic telegram from one Arthur Bohnert, Jr. of San Francisco which said that he was the attorney for Pankow and which seemed to say that Pankow had nothing additional to submit (63a).

The evaluation committee could not and did not evaluate Pankow's proposal (63a). It found the Ogden/Dwight and the Carlson proposals satisfactory but it preferred the Carlson proposal (63a-64a). The University awarded the contract to Carlson and returned to Carlson and Ogden/Dwight the bonds which they had filed (64a).

On September 23, 1971 the University made written demand upon Pankow for payment on the bond (64a, 78a). There was no response (64a). On October 19, 1972 the University assigned to plaintiffs any claim it might have against Pankow and defendant (the surety) under the bond (26a-28a).

Defendant's answering papers (96a-120a) do not take direct issue with the foregoing facts. Their recurring theme is that Pankow and the other participants did not have adequate time to prepare their proposals (98a-101a, 108a).

Defendant's principal affiant is Osterman, a vice-president of Pankow (96a). He says that Pankow spent approximately $50,000 in preparing its proposal (99a), which lends verisimilitude to plaintiffs' assertion that their complete but unsuccessful proposal cost them more than $40,000 (24a) although plaintiffs did not seek to have that determined on this motion (39a-40a).

Osterman asserts that the cost overrun was primarily due to the fact that facilities meeting the criteria of the Request required approximately 220,000 square feet "rather than the approximately 180,000 sq.ft. recommended in the Request" (100a). A somewhat similar assertion had been made in the Letter of Clarification which Pankow filed with its proposal. It said "our best efforts required us to construct approximately 220,000 sq.ft. in order to provide the facilities you indicated could be built within approximately 180,000 sq.ft." (69a).

Nothing of the sort had been recommended or indicated in the Request. At one place opposite the marginal description "AREA REQUIREMENTS" the University had said that the "minimum" gross building area should be 177,230 square feet (p. 4C-2-3 of Exhibit 9). The area was to be whatever the contestant deemed necessary

to meet the specifications but in no event less than approximately 177,230 square feet.

In another effort to excuse Pankow's default, Osterman says that in Pankow's opinion there was no way in which all the desired facilities could have been provided for $5,730,000 and that its "competitors" (i.e. Carlson and plaintiffs) "must have either quoted a higher price or provided less than the ideals set forth in the request" (100a). At the time he made this statement Pankow had had two years in which it could have viewed Carlson's and plaintiffs' proposals on request and had had nine months since the inception of this action to make such a request (122a-123a).

Osterman also urges that Pankow had presented a complete proposal by filing the documents listed in Division 3 of the Request (pp. 3A-1 to 3A-6 and 3B-1 of Exhibit 9) and that, as long as it filed such documents, it was immaterial that what they contained failed to comply with the specifications found elsewhere in the Request (102a-104a, 105a, 109a).

Osterman asserts that the forfeiture of the bond constitutes an unenforceable penalty rather than liquidated damages (106a, 111a), but he does not appear to have much confidence in that defense for he tells the court that "the greatest impediment to plaintiffs'

recovery lies in the failure of the University to submit Pankow's proposal to the evaluation committee for its determination as to whether the proposal was complete" (110a). He stresses repeatedly that Pankow was entitled to have its proposal before the evaluation committee no matter how insufficient it might be (102a, 103a, 104a and 105a), notwithstanding the views of the three architects on the committee that Pankow's proposal could not be evaluated (63a).

There is also a rather cynical defense asserted in the answering papers. Without naming names, Osterman tells the court that prior to Pankow's filing of the bond the University had represented to Pankow that the purpose of the bond was to secure compliance with a HUD requirement that there be at least three proposals inasmuch as HUD "was partially financing the project" (109a). Osterman says that, since three proposals were submitted and since the project did proceed, the University must have regarded Pankow's proposal as complete for satisfying HUD but incomplete for satisfying the condition of the bond (110a). He seems to be saying that Pankow, by deceiving HUD into believing that there would be three complete proposals, enabled the University to get a commitment from HUD and that the obtaining of HUD's commitment was the purpose of requiring the bond. It matters

not that the condition of the bond was not performed.

The Opinion of the District Court

The court recites the pertinent facts and quotes the pertinent provisions of the brochure entitled "Pre-Qualification Documents" (Exhibit 8) and of the Request (Exhibit 9) (5a-10a). It notes that six of the nine contestants withdrew after receiving copies of the Request and that the University informed each of the three who continued as to the identities of the other two (8a-9a).

The court then says that it is unnecessary to consider all the defenses which have been asserted inasmuch as there is no triable issue with respect to the defense that the bond is a penalty rather than a legally enforceable provision for liquidated damages (11a).

It cites authorities to the effect that a provision for liquidated damages will not be enforced if the amount bears no demonstrable approximation to actual damages (12a). It notes that the University could not have suffered much damage and concludes that even prospectively the bond was a penalty (13a).

The court says that plaintiffs seek to avoid this conclusion by arguing that the Request and the bond created an agreement between Pankow and the other two

contestants that if Pankow failed to submit a complete proposal it would bear a portion of the expenses of those contestants who submitted complete proposals but were not awarded the contract (14a). It then says that plaintiffs, conceding that Pankow made no direct contractual commitment with the other two contestants, argue that they are third-party beneficiaries whose potential damages should be taken into account in determining whether or not the bond was a reasonable forecast of just compensation for Pankow's failure to submit a complete proposal (14a).

The court says that, before a third party may recover, the intent to directly benefit him must be clearly manifested and that one who is merely an incidental beneficiary cannot sue the promisor (15a). It says there is no doubt that Pankow's performance, the submission of a proposal or the forfeiture of $20,000, was to be rendered to the University rather than to any of the other contestants and that "it was the University which made a separate conditional undertaking to distribute a portion of the $20,000 to plaintiffs" (16a). It says that plaintiffs were therefore not direct third-party beneficiaries but merely incidental beneficiaries who may not sue on the bond (16a). Plaintiffs, as assignees, "stand in the shoes

of the University", which cannot enforce the bond because it is a penalty (17a).

Outline of the Argument

The contract which the district court has refused to enforce arises out of a problem which confronts an owner with limited funds who wants design/build teams to propose a specified improvement for his property. If he says how much he will pay, he invariably gets more costly proposals which are submitted in the hope that they will prove so attractive that he will ignore the rules of the contest and agree to pay more. In fact, he cannot be sure that anyone will stay within his price, for, if he reserves to himself a penalty for failure to do so, the courts will not assist him to collect it.

The only way in which the owner can discourage those who would enter the contest in bad faith is to require them to reimburse those unsuccessful contestants who do conform. Moreover, it is often the only way anyone can be persuaded to enter tne contest. The contestant who, as in the instant case, will spend many thousands of dollars in preparing his proposal must be assured that the owner will abide by the rules he has announced.

A decision that there is no legally enforceable solution for such a problem, which is in effect what the district court has said, invites searching scrutiny, - particularly where, as here, Pankow and the defendant recognize the existence of the problem by informing the court that HUD insisted, as a condition of its obligation to contribute to the payment of interest on the revenue bonds, that there be assurance of at least three proposals (109a).

Plaintiffs will urge, as they did below (14a), first that there was a contract between Pankow and them, and second that, even if there were not such a contract, they would be entitled to recover on the bond because they were third-party intended-beneficiaries of a contract between the University and Pankow.

Point 1

There was as a Matter of Law a Contract between Pankow and Plaintiffs which Entitled Plaintiffs to Recover on the Bond.

The opinion of the lower court contains a misconception which leads inexorably to the result which it has reached. The court says that "as assignees, [plaintiffs] stand in the shoes of the University" (17a). Since the University has not been damaged by Pankow's

default, collection in its own behalf would be a penalty, and unenforceable (16a). Ergo, one who wears the University's shoes may not recover.

The assignment by the University was not necessary to plaintiffs' case regardless of what theory of recovery may be involved. The assignment merely avoided the necessity of joining the University as a party in interest because it might have a claim on the bond which was superior to plaintiffs' (p. 2A-2 of Exhibit 9) and avoided the necessity of proving, in an action to which the University was not a party, that the University was asserting no prior claim in its own behalf.

Plaintiffs have a direct contractual right against Pankow and its surety which exists independently of the assignment. The contract is embraced in four documents, - the bonds which were posted by each of the three contestants and the Request (29a-30a, 64a; Exhibit 9). The bond is an undertaking to pay $20,000 if the contestant does not submit a complete proposal in accordance with the Request (29a-30a). The Request says what is to become of the $20,000 (p. 2A-2 of Exhibit 9). It is first to reimburse the University for any loss it may have sustained. The balance is to be paid to those who have submitted complete proposals but have not been

awarded the construction contract (idem). If the person who has posted the bond finds the terms of the Request too burdensome, he may withdraw from the contest and receive his bond back (pp. 1A-1 of Exhibit 8 and 2A-2 of Exhibit 9).

The fact that Pankow knew that others were making identical contracts with the University for Pankow's benefit and that Pankow was told who they were (57a-58a) is persuasive evidence that the contracts taken together constituted an undertaking, a contract, by each contestant with the others that, if he did not submit a complete proposal, he would reimburse unsuccessful contestants to the extent of the difference between $20,000 and the damage which his default had inflicted on the University.

Separate writings which form parts of a single transaction and which are designed to effectuate a common purpose may be read together even though they are not all between the same parties. Kurz v. United States, 156 F. Supp. 99 (S.D.N.Y. 1957). There the court said (pages 103-104):

> "New York law, which is applicable here, requires that all writings which form parts of a single transaction and are designed to effectuate the same purpose be read together, even though they were executed on different dates and

were not all between the same parties. Nau v. Vulcan Rail & Construction Co., 1941, 286 N.Y. 188, 197, 36 N.E.2d 106, reargument denied, 287 N.Y. 630, 39 N. E.2d 267. See also McCulloch v. Canadian Pacific Ry Co., D.C.Minn.1943, 53 F.Supp. 534, 540. This is in accord with the general rule that where several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together, even though they do not expressly refer to each other. 17 C.J. S. Contracts § 298; Cf. Parker v. Commissioner, 9 Cir., 1948, 166 F.2d 364, 367. This canon of construction applies with particular force in situations where, as here, one document requires the execution of the second to accomplish its purpose. The rationale of the rule is that by construing the instruments together, the intent of the parties can be perceived and enforced. Its application is generally recognized to extend to instruments relating to the same subject matter even though some of the documents are executed by parties who have no part in executing the others. 3 Corbin on Contracts § 549 (1951 ed.). See Bowersock Mills & Power Co. v. Commissioner of Internal Revenue, 10 Cir., 1949, 172 F.2d 904; D. H. Pritchard, Contractor, Inc., v. Nelson, 4 Cir., 1945, 147 F.2d 939; Peterson v. Miller Rubber Co. of New York, 8 Cir., 1928, 24 F.2d 59."

The contract was entered into for valuable consideration. Part of the consideration was furnished by the University, which permitted Pankow to submit a proposal in the hope of getting the construction award. Without the bond, Pankow would not have been permitted to participate. Part of the consideration was furnished

by plaintiffs and by Carlson. Each agreed that if it did not submit a complete proposal, it would pay $20,000 from which Pankow would receive partial reimbursement of its expenses if Pankow submitted a complete proposal and failed to win the contract.

The lower court never discussed this point although it was thoroughly presented. The court avoided the issue in the following manner (14a):

> "Conceding that Pankow and defendant made no direct contractual commitment with either of the other two contestants, plaintiffs argue that they are third-party beneficiaries ...."

The inescapable inference from the court's language is that there couldn't have been a contract between plaintiffs and Pankow inasmuch as there was no single written instrument which both had signed. That is not the law.

Point 2

As Intended Beneficiaries of a Written Contract Between the University and Pankow, Plaintiffs are Entitled to Recover on the Bond.

The lower court impliedly recognizes that the University's "shoes" are not material to whether plaintiffs may recover as third-party beneficiaries. It

seems to say that plaintiffs may not recover inasmuch as they are only "incidental" beneficiaries (15a-16a). It says that "the intent to directly benefit such third person must be clearly manifested" (15a) and that plaintiffs are "not direct third party beneficiaries" because "it was the University which made a separate, conditional undertaking to distribute a portion of the $20,000 to plaintiffs" (16a).

In the court's view, plaintiffs could have recovered if Pankow's bond had said that the $20,000 was first to reimburse the University and then to reimburse other unsuccessful contestants; but plaintiffs cannot recover inasmuch as what was to be done with the money was to be found only in the Request prepared by the University.

This is another example of the lower court's reluctance to treat as a single contract contemporaneous writings designed to effectuate a single purpose. Suppose the brochure entitled "Pre-Qualification Documents" (Exhibit 8) had said, in language identical to that in the Request (p. 2A-2 of Exhibit 9), what would be done with the proceeds of the bond if the condition was unfulfilled. In that event Pankow could have stayed out by failing to post a bond. If it had elected to come

in, would the lower court have concluded that the bond was unenforceable because the brochure had not been signed by Pankow? Presumably so, if the court's language is to be taken seriously.

In the instant case Pankow was told, after it had posted its bond, what was going to be done with the proceeds if Pankow elected to stay in the contest and failed to submit a complete proposal. But that is a distinction without a difference. In either case Pankow had the choice of staying out if it did not want some or all of the proceeds of its bond paid over to one who had complied with the rules but had failed to win the contract.

The reason the lower court gives for refusing to permit plaintiffs to recover as third-party beneficiaries is so contrary to established rules of contract interpretation that there remains only the question whether plaintiffs would have been entitled to recover if everything had been contained in the same document. The opinion leaves no doubt that the lower court would then have answered in the affirmative (15a-16a).

The former terms "creditor-beneficiary" and "donee-beneficiary" have become obsolete. The modern test is to ask whether the promisee <u>intended</u> the third party

to be a beneficiary of the promise. If he did, the third party has a right of action against the promisor. If he didn't, the third party who benefits from the promise is but an "incidental beneficiary" and he has no right of action against the promisor.

Thus, Tentative Draft No. 4 of the Second Restatement of the Law of Contracts provides (§ 133):

> "§ 133. INTENDED AND INCIDENTAL BENEFICIARIES.
>
> "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the promise manifests an intention to give the beneficiary the benefit of the promised performance.
>
> "(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary."

In partial explanation the comment says (idem):

> "a. Promisee and beneficiary. This Section distinguishes an 'intended' beneficiary, who acquires a right by virtue of a promise, from an 'incidental' beneficiary, who does not. See §§ 135, 147. Section 2 defines 'promisee' as the person to whom a promise is addressed,

> and 'beneficiary' as a person other than the promisee who will be benefitted by performance of the promise. Both terms are neutral with respect to rights and duties: either or both or neither may have a legal right to performance. Either promisee or beneficiary may but need not be connected with the transaction in other ways: neither promisee nor beneficiary is necessarily the person to whom performance is to be rendered, the person who will receive economic benefit, or the person who furnished the consideration."

The comment then discusses a promise to pay the promisee's debt, a promise involving a gift by the promisee to the third party and "other intended beneficiaries".

If the promisee intended the third party to benefit from the promisor's performance, the latter may enforce the obligation of the promisor (Tentative Draft No. 3 of the Second Restatement of the Law of Contracts, § 135):

> "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."

It is not necessary that the promisee be identified at the time the promise is made. 2 Williston on Contracts (3d ed. 1959) § 378; Tentative Draft No. 3 of Second Restatement of the Law of Contracts § 139. The

latter explains:

> "It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made."

While the Request and the bond posted by plaintiffs created privity of contract between the University and plaintiffs, even the privity requirement as between promisee and third party has become obsolete. McClare v. Massachusetts Bonding & Insurance Co., 266 N.Y. 371, 195 N.E. 15 (1935). In McClare the defendant had issued a surety bond to secure payment by an athletic club, upon demand of the New York State Athletic Commission, of all indebtedness of the club to any entity arising out of any boxing or wrestling match conducted by the club. The plaintiff printed admission tickets and advertising circulars for such matches.

Commenting on privity, the court said (266 N.Y. 379, 195 N.E. 17):

> "Starting with the decision in Lawrence v. Fox (supra), permitting a recovery by a third party beneficiary, the courts have tended to permit a recovery where there was revealed a clear intention in the obligation so to do. The requirement of some obligation or duty running from the promisee to the third party beneficiary has been progressively relaxed until a mere shadow of the relationship suffices, if indeed it has not reached the vanishing point. (Corbin, Third Parties as Beneficiaries of Contractors' Bonds, 38 Yale Law Journal, 1.)"

There is no requirement that both or either of the contracting parties intend that the third party have the right to enforce the promise. The controlling factor is the expressed intent of the promisee to confer a benefit on the third party. Vrooman v. Turner, 69 N.Y. 280, 283-284 (1877).

Not only is the intent recited in the Request (p. 2A-2 of Exhibit 9), but the chief financial officer of the University has explained the purpose (56a-57a):

> "We wanted the design/build teams to know that the University intended to carry out in good faith the University's part of the bargain. It was not going to award the contract to a team which had failed to comply with the Request. It should have been obvious to each prospective contestant that the University could suffer only slight damage if a participant

> submitted an incomplete proposal. Thus we held out to those who participated in good faith not only the assurance that the University would not award the contract to a design/build team which failed to comply but also the assurance that, if anyone in the contest failed to comply, those who had complied but had not been awarded the contract would receive some reimbursement of the expenses which they had incurred in complying. In a real sense this was a contract not only between the University and the contestant but also between each contestant and all other contestants that he would either comply with the Request or bear part of the expenses of those who did comply but did not get the contract."

Curiously, the lower court has lifted the third sentence of the foregoing quotation from its context to reach a result at variance with the purpose expressed by the paragraph from which it has been taken (13a). Because it should have been obvious to each prospective contestant that the University could suffer only slight damage if a participant submitted an incomplete proposal, the lower court says that the bond was a penalty (13a) which bars not only the University but also the plaintiffs (17a). The expressed intention of the promisee has been ignored.

Point 3

The Other Defenses Are Without Merit.

The lower court noted the assertion of other defenses (11a) but did not discuss them. The seventh affirmative defense, that the extension of time for filing proposals without the consent of the surety had the effect of discharging the surety (37a-38a), has been withdrawn (120a).

The first and second affirmative defenses (33a-34a) are that the University and plaintiffs as its assignees are precluded from recovering inasmuch as Pankow's proposal was not submitted to the evaluation committee. This defense, according to the Osterman affidavit, is "perhaps the greatest impediment to plaintiffs' recovery" (110a). The defense serves to emphasize the abuse which the University sought to prevent (56a-57a).

There is no serious claim that Pankow submitted a proposal or a modified proposal that complied with the Request. Pankow presumably hoped that its proposal would prove so attractive that the evaluation committee would recommend that the University disregard the rules which it had prescribed in the Request (Exhibit 9). Had it

done so, it would have laid itself open to suit by Carlson and by plaintiffs, who had spent many thousands of dollars in complying with the Request.

As plaintiffs told the lower court in their memorandum there, the defense is reminiscent of a defense in one of Shakespeare's plays where the plaintiff brought suit on a sealed instrument and the court granted judgment for the defendant because the rats had eaten the seal. Defendant wants the court to rule that an undeniably incomplete proposal should have been treated as if it were complete.

The third affirmative defense refers to the University's letter of September 13, 1971 (71a-72a) in which the University asked Pankow either to withdraw its letter of clarification (68a-70a) or to specify exactly which portions of the proposal would be changed in order to meet the fixed price of $5,730,000. In the last paragraph of that letter (72a) the University said that it was unable to find in Pankow's proposal the network and the schedule of progress payments required by the Request and that these should be provided. The defense asserts that this paragraph had the legal effect of nullifying everything that was said earlier in

the letter and was tantamount to an agreement that the proposal was otherwise satisfactory! That defense is not mentioned in defendant's papers in opposition to plaintiffs' motion (88a-120a).

The fourth affirmative defense commences by quoting the final sentence on page 2A-1 of the Request (Exhibit 9), which says:

> "This bond is required to insure that an adequate number of DESIGN/BUILD PROPOSALS will be submitted to the University, and thereby protect both the University and the DESIGN/BUILD TEAMS."

The same defense appears in the Osterman affidavit. Osterman says that the purpose of the bond was to secure compliance with a HUD requirement that there be at least three proposals and that, inasmuch as three design/build teams including Pankow filed proposals, the purpose had been accomplished (110a). Defendant would have the court ignore the purpose of the contest and decide that, except for the number and type of documents to be filed, the Request was meaningless.

The fifth affirmative defense is related to the fourth. It says that the Request contained only "suggested" minimum standards and that Pankow's proposal "is not rendered incomplete by virtue of any alleged failure of said proposal to include all of the facilities envisioned in the Request for design/build proposals" (36a-37a). The defense is elaborated by the Osterman affidavit in which he says that Pankow presented a complete proposal by filing the documents listed in Division 3 of the Request (102a-104a, 105a, 109a). He argues that the documents need not meet any specification set forth in the Request.

Finally, there is a defense not asserted in the answer but raised for the first time in the Osterman affidavit. He says that in Pankow's opinion there was no way in which to stay within the price limit of $5,730,000 and yet comply with every requirement in the Request. He says that "it is Pankow's opinion and that of its consultants" that Carlson and plaintiffs must either have quoted a higher price or failed to meet some of the other specifications (100a).

Osterman does not say that he is of that opinion. Neither does he name any person who holds such an opinion. Pankow and defendant had nine months from the inception of this action and more than two months after notice of plaintiffs' motion within which to ascertain whether Carlson and plaintiffs had complied with the specifications (122a-123a). They preferred not to look and to meet Dyson's statement that the other two proposals did comply (63a-64a) by an assertion that some unnamed persons felt that maybe they didn't.

Conclusion

There was as a matter of law a contract between Pankow and defendant on the one hand and Carlson and plaintiffs on the other. Moreover, Carlson and plaintiffs were the intended beneficiaries of a contract between Pankow and the University. On both grounds plaintiffs may maintain this action.

This action does not involve a penalty. Plaintiffs seek nothing more than partial reimbursement of their expenses in preparing their proposal.

The order and judgment of the lower court should be reversed. Interlocutory judgment should be directed for plaintiffs on the issue of liability or, in the alternative, the lower court should be directed, pursuant to Rule 56(d), to specify what facts appear without substantial controversy and to say what further proceedings are necessary.

Dated: July 22, 1974.

Respectfully submitted,

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William W. Owens,

Of Counsel

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ATTORNEYS FOR Federal Sav
July 19/74